84-1176 (1)

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION and THE BROOKLYN UNION GAS COMPANY,

Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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January 1985

Question Presented

Section 210(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA) requires the Federal Energy Regulatory Commission (FERC) to issue rules requiring electric utilities, including appellant, to offer to purchase electric energy from qualifying cogeneration and small power production facilities. Section 210(b) of PURPA provides that the rates for such purchases shall be just and reasonable to the electric customers of the electric utility and in the public interest and shall not discriminate against qualifying cogenerators and small power producers. This section also specifies a maximum rate for such purchases. Section 210(f) of PURPA requires the states to implement FERC's rules, including the rule establishing the maximum rate for purchases. Section 66-c(1) of the New York Public Service Law, as applied, requires electric utilities, including appellant, to pay more for purchases of electric energy from qualifying cogeneration and small power production facilities than the maximum rate specified in Section 210(b) of PURPA.

The question presented in this case is whether Section 210 of PURPA preempts the states from requiring electric utilities to pay a rate higher than the maximum rate specified in PURPA for purchases of electric energy from qualifying cogeneration and small power production facilities.

Listing of Parent Companies, Subsidiaries and Affiliates

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Consolidated Edison Company of New York, Inc.:

Honeoye Storage Corporation (a subsidiary corporation).

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JURISDICTIONAL STATEMENT

Appellant, Consolidated Edison Company of New York, Inc. (Con Edison), appeals from the final judgment of the Court of Appeals of the State of New York in this case, and submits this jurisdictional statement to show that the Supreme Court has jurisdiction and that this appeal presents a substantial federal question.

Opinions Below

The opinion of the New York Court of Appeals is not yet reported and is set forth in Appendix A hereto (1a-15a).* The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 98 A.D.2d 377, 471 N.Y.S.2d 684 (1983) and is set forth in Appendix B hereto (16a-26a). The opinion of the Public Service Commission of the State of New York (the Commission) is reported at 48 P.U.R.4th 94 (1982) and is set forth in Appendix D hereto (29a-161a).

Jurisdiction

This case involves a constitutional challenge to a state utility regulatory statute on the ground that it is preempted by a federal statute. The Court of Appeals upheld the constitutionality of the state statute.

The Court of Appeals' final judgment was rendered on October 25, 1984, and is set forth in Appendix C hereto (27a-28a). The notice of appeal to this Court was filed with the Court of Appeals on December 21, 1984, and is set forth in Appendix E hereto (162a-66a). A copy of the notice of appeal was filed with the Supreme Court, Albany County, on December 19, 1984. This appeal is being docketed in this Court within 90 days of the date final judgment was rendered in the court below.

Jurisdiction to review the final judgment of the Court of Appeals in this case is conferred on this Court by 28 U.S.C. §1257(2).

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* Parenthetical references denoted "(—a)" are to the Appendix to this Jurisdictional Statement.

Constitutional and Statutory Provisions Involved

The pertinent constitutional and statutory provisions are set forth in Appendix F hereto (167a-206a).

Statement of the Case

A. The statutory background.

1. Section 210 of PURPA.

This Court has described Section 210 of PURPA, 16 U.S.C. §824a-3 (1982) (169a-75a), its background, and its purposes in two recent decisions: *American Paper Institute, Inc.* v. *American Electric Power Service Corp.,* 461 U.S. 402 (1983) (*AEP*) and *FERC* v. *Mississippi,* 456 U.S. 742, *reh'g denied,* 458 U.S. 1131 (1982).

As noted by this Court in *FERC* v. *Mississippi,* PURPA was part of a package of legislation, approved on the same day in 1978, that was designed to combat the nationwide energy crisis. 456 U.S. at 745.

Section 210 of PURPA seeks to encourage the development of qualifying cogeneration and qualifying small power production facilities by requiring electric utilities to offer to purchase the electric output of such facilities.* As this

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* A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. §796(18)(A) (1982) (168a). A "small power production facility" is one that has a production capacity of not more than 80 megawatts and produces electric power from biomass, waste, renewable resources (such as wind, water, or solar energy), or geothermal resources. 16 U.S.C. §796(17)(A) (1982) (167a-68a). A "qualifying cogeneration facility" or a "qualifying small power production facility" is one that meets the requirements for qualification established by FERC. 16 U.S.C. §§796(18)(B) and (17) (C) (1982) (168a-69a).

Court observed in *FERC* v. *Mississippi,* "Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels." 456 U.S. at 750.

However, Congress limited the encouragement of qualifying cogeneration and small power production facilities by placing a ceiling on the rates for purchases from such facilities. With this ceiling price, Congress intended to assure that utilities (and their customers) would not be forced to subsidize cogeneration and small power production facilities by paying more for purchases from such facilities than it would cost the utility to produce or to purchase such power from another source. Three provisions of PURPA were designed to achieve this Congressional objective.

First, Section 210(a) of PURPA, 16 U.S.C. §824a-3(a) (1982) (169a-70a), requires FERC to prescribe rules requiring electric utilities to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility.

Second, Section 210(b) of PURPA, 16 U.S.C. §824a-3 (b) (1982) (170a), sets forth the standards governing the rates at which electric utilities must purchase electric energy from qualifying cogeneration and small power production facilities. It states that the rates for such purchases "shall be just and reasonable to the electric consumers of the electric utility and in the public interest" and "shall not discriminate against" qualifying cogeneration and small power production facilities. Subdivision (b) also establishes a maximum rate for such purchases. It states that the purchase rates prescribed pursuant to Section 210(a) of PURPA shall not "excee[d] the incre-

mental cost to the electric utility of alternative electric energy."* *Id.*

Third, Section 210(f) of PURPA, 16 U.S.C. §824a-3(f) (1982) (172a-73a), requires state utility regulatory commissions to implement FERC's rules issued pursuant to Section 210(a) of PURPA. State commissions "may comply with this requirement by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *FERC* v. *Mississippi,* 456 U.S. at 751.

FERC issued its rules pursuant to Section 210 of PURPA in 1980. 45 Fed. Reg. 12214, *codified at* 18 C.F.R. Part 292 (1984). Among other things, FERC's rules require electric utilities to offer to purchase electric energy from qualifying cogeneration and small power production facilities at a rate equal to the purchasing utility's avoided cost.** 18 C.F.R. §292.304(b)(2) (1984) (194a). Although this Court upheld the validity of FERC's full-avoided-cost rule, it emphasized: (1) that "PURPA sets full avoided cost as the maximum rate that [FERC] may prescribe," *AEP,* 461 U.S. at 413, and (2) that even the "just and reasonable" standard of Section 210(b) "must be interpreted to mandate consideration of rate savings for consumers . . . ." *Id.* at 415 n.9.

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* Section 210(d) of PURPA, 16 U.S.C. §824a-3(d) (1982) (171a), defines the term "incremental costs of alternative electric energy" as "the cost to the electric utility of the electric energy which, but for the purchase from such [qualifying] cogenerator or small power producer, such utility would generate or purchase from another source."

** In FERC's rule, the term "avoided cost" is the equivalent of the term "incremental cost of alternative electric energy" used in Section 210(d) of PURPA. The terms "full avoided cost" and "avoided cost" shall be used interchangeably herein.

2. Section 66-c(1) of the New York Public Service Law.

Two years after enactment of PURPA, New York State passed a similar law. 1980 N.Y. Laws, ch. 553, §7, *amended by* 1981 N.Y. Laws, ch. 843, §9, *codified at* New York Public Service Law §66-c(1) (McKinney Supp. 1984-85) (205a-06a). Its purpose is to promote the state energy goals for developing cogeneration facilities, alternate energy production facilities, and small hydro facilities, as those terms are defined in subdivisions 2-a, 2-b, and 2-c of Section 2 of the New York Public Service Law (204a-05a) (these facilities shall be referred to herein as "state qualifying facilities").* To encourage the development of such facilities, Section 66-c(1) requires electric utilities to offer to purchase electricity produced by such facilities.

Like PURPA, Section 66-c(1) of the New York Public Service Law requires that purchases of electricity be made at rates that are just and reasonable and non-discriminatory.

The state statute differs from PURPA, however, in that it prescribes a minimum purchase price of six cents per kilowatthour for electricity purchased by an electric utility from a state qualifying facility, rather than PURPA's avoided-cost purchase rate. As the court below recognized, the state's minimum purchase rate at times exceeds Con Edison's avoided cost (7a), which, under PURPA, is the maximum rate that can be required by FERC for purchases of electric energy from qualifying cogeneration

* Generally, state qualifying facilities will constitute qualifying cogeneration or small power production facilities under PURPA (4a).

and small power production facilities. *See* 16 U.S.C. §824a-3(b) (170a); 18 C.F.R. §292.304(a)(2) (193a).*

B. The proceedings below.

After conducting hearings to implement the federal and state laws and the federal regulations, the Commission issued an order requiring Con Edison, under state law, to offer to purchase electricity from state qualifying facilities at a rate of at least six cents per kilowatthour (93a, 157a-58a).** The Court of Appeals subsequently held that

* It was recognized at the time of enactment of the minimum-rate provision of state law that this provision will require utility customers to subsidize alternate energy producers. For example, upon signing the bill containing the minimum-rate provision, the Governor noted that

> I am advised that the imposition of a minimum rate for the purchase of energy from alternate energy facilities may artificially inflate the cost of electricity and, as a result, the sponsors and I have agreed to study amendments to the legislation to avoid any adverse consequences to consumers of electricity in the State from this mandatory minimum charge.

Governor's Memorandum on Approval of ch. 843, N.Y. Laws (July 27, 1981), *reprinted in* [1981] N.Y. Laws 2627, 2628 (McKinney).

Similarly, in commenting on this bill, the Chairman of the Public Service Commission said that "[e]stablishment of a minimum price that is higher than the cost to the utility to produce the power requires a subsidy from the utility's ratepayers to the alternate energy producers." Letter to John J. McGoldrick, Counsel to the Governor, from Paul L. Gioia, Chairman, Department of Public Service, dated July 9, 1981, on S. 1701-C (Governor's Bill Jacket).

** The Commission ruled that Con Edison may recover from its customers, through the operation of its fuel adjustment clause, payments made for purchases of electricity (92a).

in order for a state qualifying facility to be eligible for the six-cents per kilowatthour rate, it must also constitute a qualifying cogeneration or small power production facility under PURPA (12a-15a).

On September 9, 1982, Con Edison commenced a proceeding in Supreme Court, Albany County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to annul the Commission's order implementing the minimum purchase-rate provision of state law. In its petition, Con Edison asserted that the state law, as applied, conflicted with, and was preempted by, the maximum-rate provision of federal law.* Pursuant to Section 7804(g) of the CPLR (McKinney 1981), the proceeding was transferred to the Appellate Division.

The Appellate Division concluded that New York State was preempted from exceeding PURPA's purchase-rate ceiling (21a).** That court concluded that the requirement in Section 210(f) of PURPA that the states implement FERC's regulations required the states to adhere to the PURPA ceiling (23a). In support of this conclusion, the Appellate Division pointed to the PURPA Conference Committee Report which stated that "'[section 210] requires that States and utilities follow rules which the Federal Energy Regulatory Commission is to prescribe' (U.S. Code Cong & Admin News, 1978, p 7831) and that '[t]his [avoided cost] limitation on the rates which may be required in purchasing [electricity under section 210] is

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* Con Edison's challenges to other aspects of the Commission's order are not involved on this appeal.

** The Appellate Division also ruled that New York State "cannot require [Con Edison] to purchase electricity from on-site generators unless they are Federal qualifying facilities" (21a). The Court of Appeals affirmed this ruling (12a-15a).

meant to act as an upper limit on the price at which utilities can be required under this section to purchase electric energy' (*id.*, at p 7832)" (23a).

The Appellate Division also recognized that the Congressional purpose of protecting utility ratepayers would be frustrated if the states were permitted to disregard the PURPA ceiling. Under this Court's holding in *AEP*, the provision in Section 210(b) of PURPA which provides that purchase rates shall be "just and reasonable to the electric consumers of the [purchasing] electric utility" requires consideration of rate savings for customers, and the Appellate Division correctly found that "[s]uch savings are impossible if the State can establish rates in excess of avoided cost" (24a).

The Court of Appeals reversed, holding that the State was free to disregard PURPA's maximum-rate provision. Dismissing the contention that PURPA requires the states to follow FERC's rules, including the avoided-cost ceiling, the Court of Appeals stated "that the PURPA avoided-cost rate is only the maximum in the context of the *federal* government's role in encouraging alternate power production" and that there is "room for requirements imposed outside [PURPA] under state law" (8a).

The Court of Appeals also rejected Con Edison's argument that adherence to the minimum-rate provision of state law would frustrate accomplishment of the Congressional objective that utility customers not subsidize the development of cogeneration and small power production (10a-11a). Referring to this Court's decision in the *AEP* case, the Court of Appeals reasoned that if this Court approved a purchase rate that would not provide rate savings to utility customers, the rate impact of the purchase

rate on utility customers must be secondary to PURPA's so-called "primary purpose" of encouraging cogeneration and small power production. Therefore, the Court of Appeals concluded, it could approve purchase rates that required utility customers to subsidize cogenerators and small power producers, because doing so furthered such "primary purpose" of PURPA (11a).*

Con Edison raised the question presented on this appeal at each stage of the proceeding below. Con Edison alleged in its Article 78 petition and argued in its briefs to the Commission, to the Appellate Division, and to the Court of Appeals that the minimum purchase-rate provision of Section 66-c(1) of the New York Public Service Law was preempted by the maximum-rate provision of Section 210(b) of PURPA. The Court of Appeals considered and expressly rejected Con Edison's constitutional argument (5a-12a).

The Question Presented is Substantial.

A. The question presented by this appeal warrants plenary review.

This case presents an important question of first impression concerning implementation of a major national energy program. The question is whether Congress intended to allow the states to disregard a carefully considered provision that was designed to protect customers

* Under the Court of Appeals' reasoning, there is no limit to the amount of subsidies utility customers could be required to bear through the purchase rates for electricity produced by cogenerators and small power producers. Indeed, under Section 66-c(1) of the New York Public Service Law, the Commission is authorized to make upward adjustments to the six-cent minimum rate (206a).

of electric utilities from having to subsidize the development of cogeneration and small power production.* In other words, did Congress intend to allow the states to convert a maximum-price statute into a minimum-price statute?

The importance of the federal program at issue has already been recognized by this Court when it accepted for review two lower-court decisions affecting this program. In *FERC* v. *Mississippi,* this Court upheld the constitutionality of Section 210 of PURPA, and in the *AEP* case this Court upheld the validity of FERC's rules issued pursuant to that statute.** This case involves the next stage in the implementation of this program: the setting of purchase rates by state utility regulatory commissions.

* The amount of such subsidies, though difficult to estimate, could be quite substantial. The six cents per kilowatthour minimum rate required by New York law is about two cents per kilowatthour above Con Edison's avoided cost at certain times (7a). If a two cents per kilowatthour subsidy were required for the 55.7 x 10^6 Mwh/yr that FERC estimates will be produced in the United States by 1995 by PURPA-induced cogenerators and small power producers, FERC, *Draft Environmental Impact Statement,* "Rulemaking for: Small Power Production and Cogeneration Facilities—Qualifying Status/Rates and Exemptions," Docket Nos. RM79-54 and RM79-55, at VII-15, Table VII-4 (June 1980), the amount of the subsidy would be in excess of $1.1 billion per year. And as we pointed out at p. 10, *supra,* the Court of Appeals has not established any limits for subsidies.

** This Court upheld FERC's full-avoided-cost rule after concluding that:

> At this early stage in the implementation of PURPA, it was reasonable for [FERC] to prescribe the maximum rate authorized by Congress and thereby provide the maximum incentive for the development of cogeneration and small power production.

AEP, 461 U.S. at 417-18.

The question presented on this appeal is of widespread importance because it affects every electric utility in the country and thousands of existing and potential cogenerators and small power producers.* Experts in the field of cogeneration have said that the decision of the Court of Appeals "is a landmark decision with major impact in New York and across the country . . . [and that] '[t]his case was being watched very carefully in terms of national implications on the fundamental issue of how much room is left for states to regulate cogeneration beyond what is specified in federal law.'" "NY Approves Cogen. Rate: Nationwide Precedent Seen," Energy User News, October 29, 1984, at 1, col. 3; at 26, col. 3.

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* Several states already appear to require or appear to authorize payments to cogenerators or small power producers in excess of avoided cost. For example:

Connecticut: 1983 Conn. Acts No. 83-529 §1

Hawaii: Hawaii Rev. Stat. §269-27.2(c) (Supp. 1983)

Indiana: Ind. Code Ann. §8-1-2.4-4(b), (c) (Burns 1982, *appeal pending* (*see* Electric Utility Week, Nov. 12, 1984)

Iowa: Iowa Admin. Code Rule 250—15.12 (476)(b)(2), *appeal pending, Iowa Power and Light Co.* v. *Iowa State Commerce Commission* (Iowa Dist. Court for Polk County, Sep. 14, 1984)

Minnesota: Minn. Stat. Ann. §216B. 164 (3)(c) (West 1984 Supp.)

Montana: Mont. Code Ann. §69-3-604(4) (1983)

New Hampshire: Docket No. DE 83-62, *Small Energy Producers and Cogenerators,* Report and Eighth Supplemental Order No. 17,104 at 32 (N.H. PUC, July 5, 1984)

New Jersey: Docket No. 8010-687, Decision and Order at III-39 (N.J. Board of Public Utilities, Oct. 14, 1981)

Oregon: Or. Rev. Stat. §758.545(1) (1983)

Vermont: *Re Small Power Production Rates,* 60 P.U.R.4th 148, 150 (Vt. Public Service Board 1984).

Review of the decision below is also warranted because it misconstrues this Court's decisions in *FERC* v. *Mississippi* and in *AEP,* see pp. 15-16, 18-20, *infra.* Review is warranted for the additional reason that the decision of the court below conflicts with a decision of the highest court of Kansas.*

B. The Court of Appeals erred in concluding that Section 210 of PURPA does not preempt the states from requiring electric utilities to pay more than avoided cost for purchases of electric energy from qualifying cogeneration and small power production facilities.

Under the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2 (167a), state laws inconsistent with federal laws must yield to federal law. *Capital Cities Cable, Inc.* v. *Crisp,* 104 S. Ct. 2694, 2700 (1984); *Brown* v. *Hotel and Restaurant Employees and Bartenders International Union Local 54,* 104 S. Ct. 3179, 3185-86 (1984). Section 66-c(1) of the New York Public Service Law should be invalidated because it is in direct conflict with and frustrates an objective of Section 210 of PURPA.

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* In *Kansas City Power & Light Co.* v. *State Corp. Commission,* 234 Kan. 1052, 676 P.2d 764 (1984), the Kansas Supreme Court held that the Kansas Corporation Commission (the KCC) was preempted from requiring Kansas Power & Light Company (KCPL) to purchase electricity from cogenerators at rates higher than avoided cost (234 Kan. at 1057, 676 P.2d at 767-68):

> We find that federal law has preempted the field in the area of cogeneration, and that the KCC, a state regulatory authority, cannot require KCPL to purchase electricity from cogenerators at a rate greater than the federal regulated rate based on avoided cost.

See Capital Cities, Inc., supra, 104 S. Ct. at 2700; *Brown, supra,* 104 S. Ct. at 3185-86.*

1. Section 66-c(1) of the New York Public Service Law is in direct conflict with Section 210 of PURPA.

The Court of Appeals erred in concluding that there is no direct conflict between PURPA's maximum purchase rate and the higher minimum rate of Section 66-c(1) of the New York Public Service Law. *See Fry* v. *United States,* 421 U.S. 542 (1975); *Case* v. *Bowles,* 327 U.S. 92 (1946); *FPC* v. *Corp. Commission,* 362 F. Supp. 522, 540-41 (W.D. Okla. 1973), *aff'd,* 415 U.S. 961 (1974). A direct conflict between these two laws exists because it is impossible for the New York Commission to comply with both the minimum-rate provision of state law and the maximum-rate provision of federal law.

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* The Court of Appeals began its preemption analysis by noting that there was a presumption against preemption "especially . . . when the federal enactment would displace a state statute governing an area historically regulated under the State's police power . . ." (6a). This statement evidences a fundamental misunderstanding of state utility regulation. The "traditional" role of the states is the regulation of retail electricity rates, not of wholesale rates such as those involved in this case. The federal government has had exclusive jurisdiction over the regulation of wholesale sales of electricity in interstate commerce since 1927 when this Court declared regulation of such transactions by the states to be beyond their authority. *Public Util. Comm'n* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83. Although the constitutional prohibition of *Attleboro* was recently relaxed by this Court, *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Service Comm'n,* 461 U.S. 375 (1983), in view of the recent and very limited entry of states into this area, the regulation of wholesale electric rates can not be viewed as a "traditional" state function.

The Court of Appeals reached the conclusion that there was no conflict between the federal and state laws by reasoning that PURPA's avoided cost ceiling rate "is only the maximum in the context of the *federal* government's role in encouraging alternate power production" and that PURPA leaves room for "requirements imposed outside [PURPA] under state law . . ." (8a).

The reasoning of the court below is based on a fundamental misunderstanding of the structure of PURPA. This statute does not contemplate separate federal and state programs. What PURPA contemplates is a single, cooperative program involving the federal and state governments. Section 210(a) of PURPA requires FERC to issue rules requiring electric utilities to offer to purchase electric energy from qualifying cogeneration and small power production facilities. An essential element of the FERC rules is the maximum purchase-rate provision. Section 210(f) of PURPA requires state utility regulatory commissions to implement FERC's rules.*

As may be seen from the foregoing summary of PURPA, no federal program is possible without state participation. Congress assigned a vital role to the states in implementing PURPA. Congress did not intend to allow the states to implement FERC's rules selectively, and surely Congress did not intend to allow the states not to implement an essential element of FERC's rules.** Contrary to

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* The legislative history of PURPA establishes that Congress intended to "require the States . . . to follow [FERC's] rules . . . ." *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 97, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831.

** The Congressional policy that utility customers not be required to subsidize the development of cogenerators and small power producers is frustrated just as much by a state-required subsidy as by a federally-required subsidy. The harm to utility customers is the same regardless of the source of the requirement.

Congress' intent, the New York Commission did not implement FERC's full-avoided-cost rule, as required by *FERC* v. *Mississippi;* the Commission simply ignored FERC's full-avoided-cost rule.

2. *Section 66-c(1) of the New York Public Service Law frustrates the objective of Section 210 of PURPA that utility customers not subsidize the development of qualifying cogeneration and small power production facilities.*

The Court of Appeals also erred in concluding that imposition of New York's six-cent minimum rate does not frustrate the Congressional objective that utility customers not subsidize the development of cogeneration and small power production. *See Arkansas-Louisiana Gas Co.* v. *Hall,* 453 U.S. 571 (1981); *Maryland* v. *Louisiana,* 451 U.S. 725 (1981); *Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 331 (1981).

In both the statute and its legislative history, Congress made clear its strong objective that utility customers not be required to subsidize the development of cogeneration and small power production.*

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* Congress adopted the avoided-cost ceiling to insure that "the rates the utilities charge their customers will not be increased." *AEP,* 461 U.S. at 415 n.9.

The legislative history of PURPA also confirms the Congressional objective that utility customers not be required to subsidize the development of cogeneration and small power production:

> The conferees intend that the phrase "just and reasonable to the electric consumers of the utility" be interpreted in a manner which looks to protecting the interests of the electric consumer in receiving electric energy at equitable rates.
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> * * *

(Footnote continued on following page)

This Court's holding in *AEP* is consistent with that intent. Not only did this Court agree that "PURPA sets full avoided cost as the maximum rate that the Commission may prescribe," *id.* at 413, but it recognized that Congress was thinking of ratepayer benefits, not ratepayer subsidies. As the Court stated, the "just and reasonable" lan-

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(Footnote continued from preceding page)

> This subsection further states that the utility would not be required to purchase electric energy from a qualifying cogeneration or small power production facility at a rate which exceeds the lower of the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and non-discriminatory, or the incremental cost of alternate electric energy. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer is meant to act as *an upper limit* on the price at which utilities can be required under this section to purchase electric energy.
>
> * * *
>
> *The provisions of this section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers.*

Joint Explanatory Statement of the Committee of Conference, H. R. Rep. No. 95-1750, 95th Cong., 2d Sess. 97-98, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831-32 (emphasis added).

In proposing to amend the Senate version of the bill, Senator Percy expressed this sentiment at Senate hearings on Section 210 of PURPA: *"It would be wrong to subsidize small producers at the expense of other customers.* Therefore, all rates which utilities or state commissions set would be based upon the cost to the utility of providing service." *Public Utility Rate Proposals of President Carter's Energy Program: Hearings on Part E of S.1469 Before the Subcomm. on Energy Conservation and Regulation of the Comm. on Energy and Natural Resources,* 95th Cong., 1st Sess., Part 2 at 386 (1977) (emphasis added).

guage of Section 210(b) of PURPA "must be interpreted to mandate consideration of rate savings for consumers that could be produced by setting the rate at a level lower than the statutory ceiling." *Id.* at 415 n.9.

In reaching the conclusion that states may impose a rate for purchases of electricity in excess of avoided cost and thereby require utility customers to subsidize cogenerators and small power producers, the court below seriously misconstrued Section 210 of PURPA and turned upside down this Court's decision in the *AEP* case.*

* In support of its conclusion, the court below also relied on FERC's opinion that it was permissible for the states to exceed the PURPA ceiling (9a-10a). The Preamble to FERC's rules issued pursuant to Section 210 of PURPA stated that "States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement" of cogneration and small power production than that provided by PURPA. *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12223 (1980), [1977-1981 Transfer Binder] FERC (CCH) ¶30,128. There are two reasons why FERC's opinion deserves to be given no weight. First, as the Appellate Division correctly pointed out, agency opinions are entitled to deference only if they are consistent with the statute and Congressional purpose (27a; *Public Service Commission* v. *Mid-Louisiana Gas Co.*, 103 S. Ct. 3024, 3037 (1983); *Escondido Mutual Water Co.* v. *La Jolla*, 104 S. Ct. 2105, 2114 n.22 (1984). As we have made clear, FERC's interpretation of Section 210 of PURPA does not pass this test. Second, FERC's opinion, issued without public notice or an opportunity for comment, does not even identify, let alone answer, the issues raised on this appeal. As this Court's prior holdings make clear, the deference rule does not apply in cases where the agency gives no indication that it grasped the questions involved in reaching its conclusion. *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978); *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 744-46 (1973); *Skidmore* v. *Swift*, 323 U.S. 134, 140 (1944).

Citing the *AEP* decision, the Court of Appeals noted that "[t]he impact of the utilities' mandated purchase rate on the cost to consumer ratepayers was but one factor that FERC was obliged to consider when it established avoided costs as the maximum rate to be imposed by federal authorities" (10a). From this, the Court of Appeals concluded that customer rate impact is a factor that could be ignored in furtherance of the so-called "primary purpose of PURPA" of encouraging cogeneration and small power production (11a).

The fact that the balancing process required by the "just and reasonable" standard led this Court to conclude in *AEP* that FERC was not unreasonable in prescribing the maximum rate authorized by PURPA does not, and rationally can not, lead to the conclusion that the same balancing process can justify a rate in excess of the maximum rate prescribed by Congress. While the "just and reasonable" standard requires consideration of various factors and a balancing of those factors, the maximum rate provision does not permit any such consideration or balancing. Once the maximum rate is reached, the balancing must stop. PURPA, its legislative history, and *AEP* all make clear that the avoided-cost limitation is an absolute ceiling on purchase rates that can not be balanced away to serve some assertedly superior objective. The avoided-cost limitation can not be read out of the statute simply because some believe that to do so would serve a desirable objective.

In holding, as it did, that "PURPA sets full avoided cost as the maximum rate that [FERC] may prescribe," *AEP, supra*, 461 U. S. at 413, and that the "just and reasonable" language of Section 210(b) of PURPA "must be interpreted to mandate consideration of rate savings for consumers that could be produced by setting the rate at a

level lower than the statutory ceiling," *id.* at 415 n.9, this Court recognized that Congress was thinking of ratepayer benefits, not ratepayer subsidies. That being so, the *AEP* decision is stood on its head when it is invoked to justify purchase rates that exceed full avoided cost.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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